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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JAN 24 PM 4:07  
CHIEF CLERKS OFFICE

Re: TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593; *Application of ASARCO, Incorporated for Renewal of Air Quality Permit No. 20345*

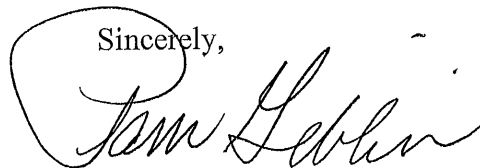
Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find an original and twelve (12) copies of ASARCO's Response to the City of El Paso's Motion to Continue the Commission's Consideration of the Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345.

Please file the original and 11 copies of this document and return one file-stamped copy to the messenger. A copy of the above referenced document is being served on the persons in the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,



Pamela M. Giblin

Enclosures

cc: Attached Service List

SOAH DOCKET NO. 582-05-0593  
TCEQ DOCKET NO. 2004-0049-AIR

2008 JAN 24 PM 4:17

APPLICATION OF ASARCO  
INCORPORATED FOR RENEWAL  
OF AIR QUALITY  
PERMIT NO. 20345

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BEFORE THE TEXAS  
CHIEF CLERKS OFFICE  
COMMISSION ON  
ENVIRONMENTAL QUALITY

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**ASARCO'S RESPONSE TO THE CITY OF EL PASO'S MOTION TO CONTINUE  
THE COMMISSION'S CONSIDERATION OF THE APPLICATION OF ASARCO  
INCORPORATED FOR RENEWAL OF AIR QUALITY PERMIT NO. 20345**

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

ASARCO L.L.C. ("Asarco") hereby files this, its response to the City of El Paso's ("the City's") Motion to Continue the Texas Commission on Environmental Quality's ("TCEQ's" or "the Commission's") Consideration of Renewal of Air Quality Permit No. 20345 ("Motion to Continue"), and would respectfully show the following:

**INTRODUCTION**

Nearly eight months after the issuance of the Executive Director's Report to the Commission on renewal of Asarco's Air Quality Permit No. 20345, and nearly a full month after the matter was scheduled for Commission consideration during the February 13, 2008 Agenda, the City of El Paso has requested that the Commission delay its consideration of Asarco's renewal application indefinitely—or for at least another seven months, but only if a new ambient air quality standard for lead is actually promulgated by then.

In its motion, the City offered three reasons for its latest delaying tactic. None of the issues raised by the City in its motion is new. None of them will interfere with the Commission's February 13 consideration of Asarco's renewal application. Indeed, none of the issues need to even be considered by the Commission on February 13. The City has failed to offer any valid reasons for continuance, and therefore, the City's motion to continue should be denied.

## ARGUMENT

### **I. EPA's Ongoing Review of the Lead Standard is Not New to the Commission and Presents No Basis for Continuance.**

The City first argues for continuance in light of EPA's ongoing review of the National Ambient Air Quality Standard ("NAAQS") for lead. Without citing any Commission rule or policy to support a continuance in this situation, the City argues that the Commission should stop the proceedings and wait to see if a new standard is promulgated in September. The City does not explain what the Commission should do if, as EPA is considering, the lead standard is revoked altogether.<sup>1</sup> Perhaps the City would find reason to request another continuance in that situation. Most importantly, the City has not demonstrated that a continuance will serve any purpose in this proceeding other than the purpose of unnecessary delay.

#### **A. EPA's Review of the Lead NAAQS is not "New Information."**

In arguing for a continuance, the City makes reference primarily to two documents: (1) the fact sheet to EPA's Final Staff Paper developed pursuant to the Agency's ongoing review of the lead NAAQS<sup>2</sup>, and, (2) the Advance Notice of Proposed Rulemaking ("ANPR") in which EPA sought public comment on several aspects of the lead NAAQS review, including the potential revocation of the standard.<sup>3</sup> Although they are described in the City's motion as "new information,"<sup>4</sup> these documents—and the topic of the EPA review more generally—are not new to the Commission. Both documents had already been issued on December 28, 2007 when the Commission scheduled Asarco's renewal application for consideration during the February 13, 2008 Agenda. The Sunset Heights protestant group filed comments to the Commission on July 24, 2007 expressly describing the ongoing review of the lead standard.<sup>5</sup> EPA's review of the lead NAAQS has been known to the Commission since well

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<sup>1</sup> See National Ambient Air Quality Standards for Lead; Advance Notice of Proposed Rulemaking, 72 *Fed. Reg.* 71,488, 71,525 (Dec. 17, 2007) (hereinafter "Lead ANPR") ("EPA solicits comment related to the questions of delisting and revocation.")

<sup>2</sup> U.S. Env't'l. Prot. Agency, Review of National Ambient Air Quality Standards for Lead: Final Staff Paper and Human Exposure and Risk Assessment Report (Nov. 2007) available at <http://www.epa.gov/ttn/naaqs/standards/pb/fs20071204.htm>.

<sup>3</sup> Lead ANPR, 72 *Fed. Reg.* 71,488, 71,525 (Dec. 17, 2007).

<sup>4</sup> Motion to Continue at 3.

<sup>5</sup> See Protestant Sunset Heights' Supplemental Comments on Executive Director's Report (Jul. 24, 2007).

before last summer. EPA's review was publicly initiated with a call for information posted to the *Federal Register* in November 2004, and EPA's current timeline for review was established by court order in September 2005.<sup>6</sup> All the while, Asarco's permit renewal has been progressing under the existing standard as it should. And yet now, on the eve of the Commission's public consideration, the City has attempted without basis to bring the proceeding to a halt. The City cannot justify a continuance by reciting information that has been before the Commission for weeks, months, or even years and then mischaracterizing it as "new information."

**B. TCEQ Makes Permitting Decisions Applying the Standards in Effect at the Time.**

During EPA's review of the lead NAAQS, TCEQ has been making permitting decisions using the existing lead standard, which carries with it the legal authority that comes with promulgation through rulemaking. Speculation about future revisions to the NAAQS carries no legal authority. Commission guidance contains a clear-cut procedure for review during permitting of a source's modeled emissions against the *existing* NAAQS.<sup>7</sup> There is no basis in the Texas Clean Air Act, TCEQ rules, or in TCEQ policy for delaying a permitting decision in anticipation of a changing standard. To the contrary, TCEQ rules and guidance establish a longstanding practice of determining the applicability of regulatory requirements to an application based on the date that the application is administratively complete. Consistent with this practice, the Commission, in the 2002 *Mirant Parker, LLC* matter, upheld the agency practice of making the best available control technology ("BACT") determinations at the time that an application is submitted.<sup>8</sup>

In this situation, there is no new standard, only the possibility of one (along with the possible elimination of the standard altogether), and Asarco's application was declared administratively complete nearly six years ago. Moreover, after hearing many of the same arguments about the lead standard that the City has re-asserted in its current motion, the Administrative Law Judges ("ALJs") who heard the 2005 contested case hearing in this renewal

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<sup>6</sup> See Lead ANPR, 72 *Fed. Reg.* at 71,493 (citing Air Quality Criteria Document for Lead; Notice; Call for Information, 69 *Fed. Reg.* 64,926 (Nov. 2004); *Missouri Coalition for the Env't v. EPA*, No. 4:04CV00660 ERW (E.D. Mo. Sept. 14, 2005)).

<sup>7</sup> See TEX. COMM'N ON ENV'T'L QUALITY, AIR QUALITY MODELING GUIDELINES, RG-25, § 3.6 (Feb. 1999).

<sup>8</sup> SOAH Docket No. 582-00-1045, TNRCC Docket No. 2000-0346-AIR; *Application of Mirant Parker, LLC for Permit Nos. 40619 and PSD-Texas-933*; Finding of Fact No. 33 and Conclusion of Law No. 8 (Jan. 7, 2002).

proceeding concluded that Asarco's renewed operation under the permit will likely not cause or contribute to a condition of air pollution.<sup>9</sup> The basis for the ALJs decision was that 1992 modeling (which has now been updated with newer, more comprehensive modeling) "predicted lead concentrations significantly *below the NAAQS*."<sup>10</sup>

The City's request for a seven-month continuance until EPA action on a new lead NAAQS is not just contrary to Commission practice, it is also fundamentally unnecessary given the mechanism under which the federal Clean Air Act and the Texas Clean Air Act provide for attainment of the NAAQS. Simply put, the renewal of Asarco's permit against the NAAQS of today will not "grandfather" the Asarco El Paso Plant or otherwise allow it to exceed any revised NAAQS of the future. Just as it has done in the past, Asarco will continue to reduce lead emissions as new technology and other opportunities for reduction become available. The El Paso Plant stopped operating as a lead smelter in 1985. Asarco reduced lead emissions by 6.50 tons per year when the company installed its ConTop reactor system in 1992.<sup>11</sup> Upon restart, the Plant's permitted lead emissions will be reduced by another 9.49 tons per year as a result of the company's elimination of certain feedstocks.<sup>12</sup> At their single highest point, lead concentrations modeled from the Plant will be less than 20% of the existing lead NAAQS that applies to this renewal. This process of ongoing reduction will occur alongside any future revisions to the federal NAAQS, as is the case for every stationary source in Texas.

## **II. The City Cannot Bootstrap the Need for a Continuance by Filing a Petition With No Basis in Commission Procedure.**

The City next argues that a continuance is necessary because it "desires" to file a Petition for Revocation of Asarco's air permit. The City's motion leaves little if any uncertainty about what the City "desires" to include in its Petition for Revocation, as the City has apparently used its Motion to Continue as a means to show the Commission its Petition for Revocation before it satisfies the procedural requirement to obtain relief from the automatic stay of proceedings against Asarco that is pending in the U.S. Bankruptcy Court for the Southern

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<sup>9</sup> SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, Proposal for Decision, *Application of Asarco, Inc. to Renew Air Quality Permit No. 20345* at 96 (Oct. 27, 2005).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> Tex. Comm'n on Env't'l Quality, *Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345* at 1, n.1 (May 1, 2007)

<sup>12</sup> *Id.* at 14.

District of Texas.<sup>13</sup> The City's Motion to Continue contains a long list of arguments that the City "desires" to make (but presumably is not actually making now, because that would violate the Bankruptcy Court's automatic stay). Absent from the Motion to Continue is any reason that the City's "desired" plan would actually warrant a continuance.

There is no basis in the Commission's procedural rules to justify a delay in the proceedings to give the City additional time to prepare a Petition for Revocation. In fact, there is no basis in the Commission's procedural rules for the City to even file a Petition for Revocation; such an instrument is not defined in Commission rules. The statutory provision that the City makes reference to in previewing its unauthorized petition, TEX. HEALTH & SAFETY CODE § 7.302, includes no provision for a third party to petition the Commission for revocation of an air permit. Thus, even assuming the City could obtain a Bankruptcy Court ruling allowing it to file a Petition for Revocation, and if the City then in turn files such a petition, then consideration of the Petition would be entirely at the Commission's discretion, if the petition had any validity at all. Such a proceeding would be separate and independent from the renewal proceeding, and the Commission should not delay the renewal proceeding in anticipation of the City's threatened petition. To do so would reward the City for introducing (but not actually filing) a procedural red herring some eight months after the issuance of the Executive Director's Report and just three weeks prior to the Commission's scheduled consideration of the renewal proceeding.

The City's preview reveals that the Petition for Revocation would add nothing in the way of new information to the proceeding. Nearly all of the arguments presented by the City in its preview of the Petition for Revocation are taken directly from the City's past comments on the Executive Director's Report, which the City filed in June 2007. Thus, the arguments that will apparently be presented in the Petition for Revocation have been before the Commission for over seven months. In July 2007, the Executive Director considered and responded to the City's arguments, and the Executive Director recommended no changes to his Report as a result of the City's comments. There is no reason to continue the renewal proceeding so that the City may repackage these old arguments into a new filing. The City's transparent delaying tactic should not be rewarded.

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<sup>13</sup> Asarco disputes the City's position that it is unnecessary for the City to obtain relief from the automatic stay before filing a Petition for Revocation to the Commission. Additionally, Asarco's position is that such relief would not be appropriate under federal bankruptcy rules.

### **III. The City's Speculation About Asarco's Bankruptcy is No Reason for Continuance.**

In the final section of its motion, the City argues that a continuance is necessary because Asarco's bankruptcy reorganization has rendered the renewal proceeding "speculative." Here, it is only the City's argument that is "speculative." The City would have the Commission halt the renewal proceeding because Asarco might someday be purchased by an investor who, among other things, might not "agree to be bound by the applicable statutes and rules."<sup>14</sup> Fortunately, the Commission has regulatory and enforcement powers to ensure that all members of the State's regulated community will be bound by the applicable rules and statutes.<sup>15</sup> However, there is nothing in "the applicable statutes and rules" to say that a debtor in bankruptcy is not eligible to hold and renew a Texas air quality permit. The City cannot rely on its own speculation to justify delaying the completion of a lengthy and rigorous proceeding.

In contrast to the City's misguided speculation about Asarco's future, the facts demonstrate that the bankruptcy reorganization has not prevented Asarco's current management team from positioning the Company and the El Paso Plant for long-term strength following emergence from bankruptcy. Asarco has maintained staff at the El Paso Plant throughout the entirety of its maintenance and care shutdown. Since the issuance of the Executive Director's Report, the company has acted aggressively, investing time and money to prepare to meet the Executive Director's recommendations as expeditiously as practicable. Asarco has been steadfastly working to complete on-site remediation projects, and the company assumed control from EPA of the remediation of residential properties in the El Paso Metals Site. Asarco and the United Steelworkers Union reached a mutually-favorable collective bargaining agreement, covering over 1600 workers at five Asarco plants including El Paso. These actions are just a few examples of Asarco's commitment to the El Paso Plant and the value that it brings to the community and the American manufacturing sector.

### **IV. Public Participation Considerations Warrant Prompt Denial of the City's Motion.**

In its Motion to Continue, the City included a "request for prompt ruling by the Commission."<sup>16</sup> The City cited the logistical needs of those who will travel from El Paso to

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<sup>14</sup> Motion for Continuance at 9.

<sup>15</sup> See, e.g., TEX. HEALTH & SAFETY CODE § 382.011; TEX. WATER CODE §7.002.

<sup>16</sup> Motion for Continuance at 9-10.

Austin for the February 13, 2008 Agenda.<sup>17</sup> However, the City's concerns for the Agenda attendees did not compel the City to file its Motion to Continue any sooner than 25 days after consideration at Agenda was scheduled, despite the fact that the motion is entirely concerned with issues known to the City and the Commission well in advance of the December 28 scheduling. Asarco agrees that the logistical needs of those planning to attend the meeting represent a valid consideration for the scheduling of this issue at Agenda. The Commission's action in providing 47 days notice before the Agenda has no doubt aided those who wish to travel to Austin. The logistical concerns identified by the City are best served by promptly denying the City's Motion to Continue and considering Asarco's permit renewal application at the scheduled date and time. The City has presented no legitimate need for any other scheduling.

### **CONCLUSION AND PRAYER**

In its Motion to Continue, the City of El Paso has offered no new information beyond what has already been presented to the Commission. The City has not offered any valid basis for delaying the Commission's proceeding, and the City has not made any demonstration of how the issues presented in the City's motion would interfere with the Commission's February 13, 2008 consideration of Asarco's renewal application. The City cannot create the need for a continuance by repackaging its earlier arguments into a new petition, and the City certainly cannot do so by merely announcing its intent to file a petition that has no basis in Commission rules. The City's motion is a transparent attempt to circumvent the Commission's briefing limits that have been established for this matter and to unnecessarily delay this proceeding by at least seven months.

Accordingly, Asarco respectfully requests that the Commissioners deny the City of El Paso's Motion to Continue the Texas Commission on Environmental Quality's Consideration of Renewal of Air Quality Permit No. 20345.

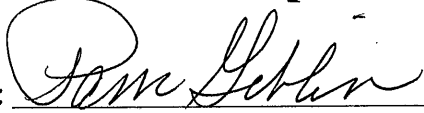
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<sup>17</sup> *Id.*



Respectfully submitted,

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By: 

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the foregoing by facsimile and/or U.S. mail on the following parties on this 25th day of January, 2008.

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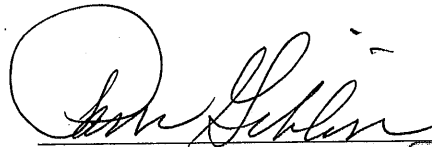
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